

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

4 - - - - - x

5 In the Matter of:

6

7 SEARS HOLDING CORPORATION,

8 Debtor.

9 - - - - - x

10 Adv. Case No. 20-06480-rdd

11 - - - - - x

12 KMART HOLDING CORPORATION et al.,

13 Plaintiffs,

14 v.

15 WINNING RESOURCES LIMITED,

16 Defendant.

17 - - - - - x

18 Adv. Case No. 20-06594-rdd

19 - - - - - x

20 SEARS, ROEBUCK AND CO. et al.,

21 Plaintiffs,

22 v.

23 CLEVA HONG KONG LTD.

24 Defendants.

25 - - - - - x

1 United States Bankruptcy Court
2 300 Quarropas Street, Room 248
3 White Plains, NY 10601

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5 November 10, 2021

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21 B E F O R E :
22 HON ROBERT D. DRAIN
23 U.S. BANKRUPTCY JUDGE
24

25 ECRO: UNKNOWN

1 HEARING re Motion for Omnibus Objection to Claim(s) /
2 Debtors Twenty-First Omnibus Objection to Proofs of Claim or
3 Ballots (Reclassified/Disallowed Claims) (ECF #8451)

4 Responses Filed:

5 A. Patricia Adams Response (ECF #8473)

6 B. Debtors' Supplemental Objection and Reply in Support
7 (ECF# 1002)

8 C. Reply of Beau LaBaron (ECF #10058)

9

10 HEARING re Motion for Omnibus Objection to Claim(s) /
11 Debtors Twenty-Third Omnibus Objection to Proofs of Claim
12 (No Liability Claims) (ECF #9284)

13 Responses Filed:

14 A. Response of Joonhee Paek (ECF #9304)

15 B. Response of Lorraine Majeski (ECF #9315)

16 C. Response of Lorraine Majeski (ECF #10044)

17 D. Objection of Beau LaBaron (ECF #9333)

18 E. Objection of Beau LaBaron (ECF #9336)

19 F. Objection of Marshall Lindquist (ECF #9339)

20 G. Objection of Beau Brady LeBaron (ECF #9539)

21 H. Debtors' Supplement Objection and Report in Support
22 (ECF #10002)

23 I. Reply of Beau LaBaron (ECF #10058)

24

25

1 HEARING re Motion for Omnibus Objection to Claim(s) /
2 Debtors Thirty-First Omnibus Objection to Proofs of Claim
3 (Reclassify Secured Claims) (ECF #9658)

4 Responses Filed:

5 Debtors' Reply in Support (ECF #10024)

6

7 HEARING re Debtors' Thirty-Third Omnibus Objection to Proofs
8 of Claim (To Reclassify or Disallow Claims) filed by Garrett
9 A. Fail on behalf of Sears Holdings Corporation (ECF #9787)

10 Responses Filed:

11 Debtors' Reply in Support (ECF #10024)

12

13 HEARING re Motion for Omnibus Objection to Claim(s) /
14 Debtors Thirty-Sixth Omnibus Objection to Proofs of Claim
15 (Reclassifying Claims) (ECF #9975)

16 Responses Filed:

17 Response of Kingdom Seekers Inc. (ECF #10031)

18

19 HEARING re Adversary proceeding: 20-06480-rdd Kmart Holding
20 Corporation et al v. Winning Resources Limited
21 Motion to Dismiss Adversary Proceeding filed by Alexander
22 Tiktin on behalf of Winning Resources Limited. (ECF #11)

23

24

25

1 HEARING re Adversary proceeding: 20-06480-rdd Kmart Holding
2 Corporation et al v. Winning Resources Limited
3 Declaration of David H. Wander, Esq. (related document(s)11)
4 filed by Alexander Tiktin on behalf of Winning
5 Resources Limited. (ECF #12)

6
7 HEARING re Adversary proceeding: 20-06480-rdd Kmart Holding
8 Corporation et al v. Winning Resources Limited Declaration
9 of Syed Mohi (related document(s)11) filed by Alexander
10 Tiktin on behalf of Winning Resources Limited. (ECF #13)

11
12 HEARING re Adversary proceeding: 20-06480-rdd Kmart Holding
13 Corporation et al v. Winning Resources Limited Objection to
14 Motion Plaintiff's Objection to Winning Resources Limited's
15 Motion to Dismiss (related document(s)11) filed by Steven J.
16 Reisman on behalf of Kmart Holding Corporation, Sears,
17 Roebuck and Co. (ECF #14)

18
19 HEARING re Adversary proceeding: 20-06480-rdd Kmart Holding
20 Corporation et al v. Winning Resources Limited IN SUPPORT OF
21 MOTION TO DISMISS THE COMPLAINT, PURSUANT TO RULE 7004 OF
22 THE FEDERAL RULES OF BANKRUPTCY PROCEDURE, AND RULES 4(m)
23 AND 12(b)(5) OF THE FEDERAL RULES OF CIVIL PROCEDURE filed
24 by Alexander Tiktin on behalf of Winning Resources Limited.

25

1 HEARING re Adversary proceeding: 20-06480-rdd Kmart Holding
2 Corporation et al v. Winning Resources Limited Declaration
3 of Terence G. Banich in Support of Plaintiffs' Objection to
4 Winning Resources Limited's Motion to Dismiss (related
5 document(s)14) filed by Steven J. Reisman on behalf of Kmart
6 Holding Corporation, Sears, Roebuck and Co. (ECF #19)

7
8 HEARING re Adversary proceeding: 20-06480-rdd Kmart Holding
9 Corporation et al v. Winning Resources Limited Supplemental
10 Declaration BY DAVID H. WANDER, ESQ. IN SUPPORT OF MOTION BY
11 WINNING RESOURCES LIMITED TO DISMISS THE COMPLAINT, PURSUANT
12 TO RULE 7004 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE
13 AND RULES 4(m) AND 12(b)(5) OF THE FEDERAL RULES OF
14 CIVIL PROCEDURE (related document(s)11) filed by David H.
15 Wander on behalf of Winning Resources Limited.(ECF #21)

16
17 HEARING re Adversary proceeding: 20-06480-rdd Kmart Holding
18 Corporation et al v. Winning Resources Limited Response
19 PLAINTIFFS RESPONSE TO SUPPLEMENTAL DECLARATION OF DAVID H.
20 WANDER IN SUPPORT OF MOTION BY WINNING RESOURCES LIMITED TO
21 DISMISS THE COMPLAINT (related document(s)21) filed by
22 Steven J. Reisman on behalf of Kmart Holding Corporation,
23 Sears, Roebuck and Co. (ECF #23)

24
25

1 HEARING re Adversary proceeding: 20-06480-rdd Kmart Holding
2 Corporation et al v. Winning Resources Limited
3 Notice of Adjournment of Hearing (ECF #24)
4

5 HEARING re Amended Notice of Agenda / Notice of Amended
6 Agenda of Matters Scheduled for Hearing to be Conducted
7 Through Zoom on November 10, 2021 at 10:00 a.m.
8

9 HEARING re Notice of Agenda of Matters Scheduled for Hearing
10 to be Conducted Through Zoom on November 10, 2021 at
11 10:00 a.m.
12

13 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
14 and Co. et al v. Cleva Hong Kong Ltd. Motion to Dismiss
15 Adversary Proceeding filed by Michael R. Herz on behalf of
16 Cleva Hong Kong Ltd. (ECF #4)
17

18 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
19 and Co. et al v. Cleva Hong Kong Ltd. Affidavit Declaration
20 of Hong Chen (related document(s)4) Filed by Michael R. Herz
21 on behalf of Cleva Hong Kong Ltd. (ECF #5)
22
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1 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
2 and Co. et al v. Cleva Hong Kong Ltd. Notice of Hearing on
3 Motion to Dismiss Adversary Proceeding (related
4 document(s)4) filed by Michael R. Herz
5 on behalf of Cleva Hong Kong Ltd. (ECF #6)

6
7 HEARING re Certificate of Service Regarding Motion to
8 Dismiss Adversary Proceeding, Declaration in Support, Notice
9 of Hearing (related document(s)6, 5, 4) Filed by Michael R.
10 Herz on behalf of Cleva Hong Kong Ltd. (ECF 37)

11
12 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
13 and Co. et al v. Cleva Hong Kong Ltd. Memorandum of Law
14 (related document(s)4) filed by Brigitte McGrath on behalf
15 of Kmart Holding Corporation, Sears, Roebuck and Co.
16 (ECF #12)

17
18 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
19 and Co. et al v. Cleva Hong Kong Ltd. REPLY OF DEFENDANT
20 CLEVA HONG KONG LTD. IN SUPPORT OF MOTION TO DISMISS
21 ADVERSARY PROCEEDING PURSUANT TO FEDERAL RULE OF CIVIL
22 PROCEDURE 12(b)(5) (related document(s)9, 4) filed by
23 Michael R. Herz on behalf of Cleva Hong Kong Ltd. (ECF #14)

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25

1 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
2 and Co. et al v. Cleva Hong Kong Ltd. Affidavit DECLARATION
3 OF MICHAEL R. HERZ, ESQ. IN SUPPORT OF MOTION OF DEFENDANT
4 CLEVA HONG KONG LTD., TO DISMISS ADVERSARY PROCEEDING
5 PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(5)
6 (related document(s)14) Filed by Michael R. Herz on behalf
7 of Cleva Hong Kong Ltd. (ECF #15)

8

9 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
10 and Co. et al v. Cleva Hong Kong Ltd. REPLY OF DEFENDANT
11 CLEVA HONG KONG LTD. IN SUPPORT OF MOTION TO DISMISS
12 ADVERSARY PROCEEDING PURSUANT TO FEDERAL RULE OF CIVIL
13 PROCEDURE 12(b)(5) AND DECLARATION OF MICHAEL HERZ IN
14 SUPPORT THEREOF (related document(s)15, 14) Filed by Michael
15 R. Herz on behalf of Cleva Hong Kong Ltd. (ECF #16)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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3 WEIL, GOTSHAL & MANGES LLP

4 Attorneys for the Debtors

5 767 Fifth Avenue

6 New York, NY 10153

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8 BY: DOMINIC LITZ

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13 JOOHEE PAEK, Pro Se

14 BEAU LEBARON, Pro Se

15 LORRAINE MAJESKI, Pro Se

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1 P R O C E E D I N G S

2 THE COURT: Good morning. This is Judge Drain.

3 We're here on Sears Holding Corporation, et al, omnibus

4 hearing date. This hearing is being held completely

5 remotely primarily by Zoom for the government, unless

6 someone doesn't have access to a device with a screen, in

7 which case they're appearing by telephone.

8 I have the Notice of Amended Agenda for today's

9 omnibus hearing, and I'm happy to go down it in the order of

10 the agenda. So the first matter on is that portion of the

11 Debtor's Twenty-First Omnibus Objection to Proofs of Claim

12 and the related supplement dated October 28th as it applies

13 to Patricia Adams. It also deals with a claim filed by Beau

14 LeBaron, but that's also addressed in the next matter on the

15 calendar, which is the Debtor's Twenty-Third Omnibus

16 Objection, and I'll hear that objection then.

17 So is Ms. Adams on the phone or on Zoom? Okay.

18 Do I have counsel for the Debtors?

19 MR. LITZ: Good morning, Your Honor. Dominic

20 Litz, Weil, Gotshal Manges on behalf of the Debtors. Can

21 you hear me all right?

22 THE COURT: Yes, I can hear you and see you fine.

23 MR. LITZ: Thank you.

24 THE COURT: So let me ask you, have there been any

25 further developments on this claim objection after the

1 response by Ms. Adams and then the Debtor's supplemental
2 objection that was filed on the 28th and served on the 28th
3 of October?

4 MR. LITZ: There has not.

5 THE COURT: Okay. All right. I will grant that
6 portion of the claim objection that seeks to reclassify the
7 priority claim asserted by Ms. Adams to a general unsecured
8 claim. And when I say priority, I mean both her assertion
9 that the claim is entitled to priority under Section
10 507(e)(4), and treatment as an administrative expense under
11 503(b)(9) of the Bankruptcy Code.

12 It's clear from my review of her claim and her
13 response to the Omnibus Objection that this claim is not
14 entitled to priority under either of those two sections.
15 The burden of proof as to whether a claim is entitled to
16 priority status under Section 507 of the Bankruptcy Code is
17 on the Claimant. See Bethlehem Steel Corp., 479 F.3d 167,
18 172 (2d Cir. 2007) and In re OldCo. M Corporation, 438 B.R.
19 775, 786 (Bankruptcy S.D.N.Y. 2010).

20 And in addition, the courts should construe
21 requests for priority treatment narrowly given the policy of
22 the Bankruptcy Code generally providing for pro rata
23 treatment of all unsecured claims except where Congress has
24 specifically delineated that priority treatment is
25 warranted. See Howard Delivery Services v. Zurich American

1 Insurance Company, 547 U.S. 651, 667, and 669 (2006) and
2 Amalgamated Insurance Fund v. McFarland's, Inc., 789 F.2d
3 98, 100 (2d Cir. 1986).

4 Here, the asserted basis for priority treatment
5 isn't actually within Sections 5074, 503(b)(9). Ms. Adams
6 did not provide goods and services to the Debtor. Rather,
7 the Debtor provided services to her, and it's the claim for
8 those deficient goods and services, that is the basis for
9 her claim. So she would not fit within the administrative
10 expense priority under 503(b)(9), nor would she fit within
11 507(a)(4), which is reserved for employees.

12 It's clear from her claim and her response that
13 she's not an employee and this is not a claim for pre-
14 petition wages or benefits. She does not assert that this
15 service agreement was supported by any sort of deposit that
16 she would be entitled to having an administrative expense
17 claim for as limited by the applicable provision, which is
18 507(a)(7) of the Code, and she wouldn't fit into any other
19 provision of 507.

20 So you can submit an order reclassifying Ms.
21 Adams' claim as a general unsecured claim, and it should
22 state obviously that all of the Debtor's other potential
23 objections to the claim are fully reserved.

24 MR. LITZ: Thank you, Your Honor. We'll submit
25 the order.

1 THE COURT: Okay. All right. The next matter on
2 the agenda addresses responses to the Debtor's Twenty-Third
3 Omnibus Objection to Proofs of Claim, which then was
4 supplemented by and in large measure replaced by the
5 Debtor's Supplemental Objection and reply dated October 28.
6 And there were responses to these by -- these Omnibus
7 Objections by a number of Creditors. So I'm happy to go
8 through those in order.

9 The first one that we'll address is Ms. Paek,
10 Joonhee Paek, P-A-E-K. I hope I'm pronouncing that
11 correctly.

12 MS. PAEK: Yes.

13 THE COURT: Ms. Paek, are you on the phone?

14 MS. PAEK: Yeah. No, I'm on the Zoom.

15 THE COURT: Oh, there you are. Very well. I see
16 you. Thank you. Okay. So Ms. Paek, what the Debtors are
17 seeking here for purposes of this hearing is to reclassify
18 your priority claim, because you've checked the box for
19 priority claim, to a general unsecured claim. They're not
20 at this point disputing whether you have a claim against
21 Sears.

22 They just dispute that to the extent that claim
23 would be allowed, it's not a priority claim, i.e. that it
24 would be entitled to distributions in full before the
25 general unsecured Creditors are paid. And the basis for

1 that assertion is that the claim you have for unpaid
2 vacation would not fall within the priority that Congress
3 provided for in either -- well, in Section 507(a)(4)(A) of
4 the Bankruptcy Code, which says that there's a fourth
5 priority unsecured claim. It's capped in a dollar amount
6 for a person earned within 180 days before the date of the
7 filing of the bankruptcy petition or the date of the
8 cessation of the Debtor's business, whichever occurs first,
9 for, among other things, wages, salaries, and vacation.

10 So, to be within that priority, the vacation pay
11 covered in your claim and response would need to have been
12 earned before April 18 -- I'm sorry, between April 18, 2018,
13 and the date that the Debtors filed their bankruptcy case,
14 which was 180 days later. And the Debtors contend that you
15 were not working at that time and therefore could not have
16 earned the vacation. They state that you were -- you ceased
17 your employment in 2016 and therefore wouldn't fall within
18 this priority.

19 MS. PAEK: So Your Honor, I actually worked the
20 time. I cannot recall exactly back in 2014 or '13, and then
21 I switched my status to part-time. And so those are
22 actually accumulated unpaid vacation time. At the time, the
23 pharmacist -- I am a pharmacist, and in our region, we had a
24 (indiscernible) choice because I worked in a very remote
25 area. And so I wasn't able to take vacation, so my district

1 manager told me that we can work things out and I can roll
2 over to the following years and whatnot, and I can always
3 use later years or later time.

4 And according to the California Labor Law, unpaid
5 vacation time, vacation hours, is earned income, and I am
6 entitled to get paid. And so -- but unfortunately, my
7 district manager quit, and then the new manager got onboard.
8 And so I reached out to the employee -- the HR, and they
9 said just work with your DM, district manager, and see what
10 -- then this district manager had no idea how to handle
11 anything. Then I changed so many district managers.
12 Thereafter, they actually laid me off because the pharmacy,
13 that store closing down. And --

14 THE COURT: When were you laid off?

15 MS. PAEK: I believe it was 2016.

16 THE COURT: Okay.

17 MS. PAEK: Yeah, 2000 -- yeah, late 2016, I
18 believe.

19 THE COURT: Okay. So let me be clear. You may
20 well have a claim for unpaid vacation as you noted, both
21 against Sears and under the California Labor Laws. But this
22 objection is not about whether you have a claim. It's about
23 whether that claim is entitled to payment ahead of the other
24 unsecured claims in the case as a priority claim. And
25 Congress --

1 MS. PAEK: Mm-hmm.

2 THE COURT: -- in Section 507 of the Bankruptcy
3 Code listed a number of types of claims that have priority,
4 and otherwise all other types of unsecured claims, i.e.
5 claims that don't have a lien securing them, are general
6 priority. And the only priority that your claim could fit
7 into, which is a claim for unpaid vacation or wages,
8 Congress limited.

9 It made the decision that the only priority claim
10 for wages or vacation is for wages or vacation -- and I'm
11 quoting from the statute now -- earned within 180 days
12 before the date of the filing of the petition in bankruptcy.
13 So you would have to have earned your vacation or wages
14 between April 18, 2018 and the bankruptcy petition date to
15 fit into this priority.

16 And it's clear to me from the facts that that
17 didn't happen, that you actually earned it sometime before
18 you were laid off, which was in 2016. So this objection is
19 right in the sense that you don't have a priority claim, and
20 that's all it -- that's all the relief it seeks. It doesn't
21 seek to disallow your claim, that Debtors are reserving
22 those rights. But because they want to make distributions
23 on priority claims to get that out of the way, they brought
24 this objection so that your claim wouldn't be paid before
25 it's supposed to be paid.

1 MS. PAEK: Okay, but I -- am I still be entitled
2 to get payment?

3 THE COURT: You might. They haven't waived their
4 right to object to your claim on the merits. That's
5 reserved for the future. And I have to say that the
6 likelihood of your getting paid on that claim in full has
7 been addressed in a number of hearings before me and in the
8 Debtor's Plan and Disclosure Statement.

9 The ability of general unsecured Creditors, and
10 that's where your claim would fall, to recover in full
11 really depends largely upon the recovery in ongoing lawsuits
12 against other parties like Mr. Lampert's company. And those
13 are in still fairly early stages, and one can't really make
14 a prediction how those lawsuits will turn out, whether
15 they'll result in a big recovery, or alternatively no
16 recovery, or something in between.

17 So what the Debtors are trying to do is fix the
18 amount of claims that are entitled to 100 percent payment as
19 a priority claim because they may well have enough money to
20 make those payments in the near future as opposed to
21 payments on the general unsecured Creditors, which will have
22 to wait for litigation recoveries.

23 MS. PAEK: Mm-hmm.

24 THE COURT: Okay?

25 MS. PAEK: Okay.

1 THE COURT: So I'm sorry about this, but that's
2 the -- you know, that's how the Bankruptcy Code is
3 structured in terms of giving priority to certain types of
4 claims and not to most claims.

5 MS. PAEK: All righty. Thank you, sir.

6 THE COURT: Okay. So I will enter an order
7 granting the claim objection insofar as it sought to
8 reclassify this claim from priority to general unsecured.
9 And it'll reserve the Debtor's rights to object on other
10 grounds and your rights, obviously, to assert the claim as a
11 general unsecured claim.

12 MS. PAEK: Okay. Thank you.

13 THE COURT: Okay. All right. The next claim is a
14 claim by Lorraine Majeski. I don't know -- oh, I see you,
15 Ms. Majeski.

16 MS. MAJESKI: Hello.

17 THE COURT: Good morning. And again, although
18 this claim objection was originally not one that sought only
19 to reclassify your claim, it raised issues about the bar
20 date and the merits of the claim. At this point, based on
21 the supplement to the objection and the reply to your
22 response to their claim objection, the Debtors are seeking
23 only two things.

24 First, there are two claims filed. There's one
25 that's number 19381 and there's a shortly later one filed as

1 19385, and they object to the first one on the basis that
2 the second one supersedes it, and there shouldn't be a
3 double recovery on two of the same claims.

4 In addition to that, they seek to reclassify the
5 surviving claim, 19385, from priority to general unsecured.
6 I don't know if you were listening when I was talking to Ms.
7 Paek right before you, but again, the Bankruptcy Code
8 establishes priorities for certain types of claims if they
9 fall within the parameters in the section of the Bankruptcy
10 Code that does that. And all other unsecured claims are
11 treated pro rata without that priority.

12 And so when I say "reclassify", there -- your
13 claim had asserted priority status, and the Debtors are
14 contending that it doesn't really fit within any priority
15 section of the Bankruptcy Code and therefore should be
16 treated as an unsecured claim. I read your response, and I
17 think in large part you're looking just to determine what
18 your pension benefits are. Am I right about that?

19 MS. MAJESKI: No, not really.

20 THE COURT: Oh, okay.

21 MS. MAJESKI: What I was trying to do is get proof
22 from Sears because at the time that I actually entered the
23 claim, I couldn't find what I did with the letter. Because
24 I wasn't able to collect the retirement benefit unless I
25 initiated my entire pension. So I had asked for a letter

1 from them, and I actually had gotten it in May of 2018 that
2 said if I retired in 2019, the amount would've been 9,900;
3 if I retired in '21, it was 12,000; if I retired in 2023, it
4 was 15,000.

5 So that was the letter I was seeking. And I
6 looked at the claim because they said a duplicate, but in
7 essence, if the first one was for the one at that time that
8 I would've retired around that time that they fired -- filed
9 bankruptcy, it would've been one number, right? But I
10 didn't know what the 15,000 would've been in '23 because I
11 couldn't find it. So I mean, theoretically in my letter
12 that I wrote to you, I said, well, the second claim
13 theoretically then would be the difference between the 9,900
14 and the 15.

15 THE COURT: So when did you retire?

16 MS. MAJESKI: I haven't. I'm still working.

17 THE COURT: What --

18 MS. MAJESKI: And so --

19 THE COURT: But --

20 MS. MAJESKI: -- my thing --

21 THE COURT: No, not at Sears, obviously, right?

22 MS. MAJESKI: Mm-hmm. Right.

23 THE COURT: You're not working at Sears.

24 MS. MAJESKI: Right. No, I'm not.

25 THE COURT: But you're covered by --

1 MS. MAJESKI: I retired in 1970, but I couldn't
2 take the supplement pension benefit until I fully retired.

3 THE COURT: Right.

4 MS. MAJESKI: So it's kind of like age
5 discrimination.

6 THE COURT: Well --

7 MS. MAJESKI: Wait a second, that's my money.

8 THE COURT: Right. But so when did you --

9 MS. MAJESKI: But I -- I'm not --

10 THE COURT: When did you leave Sears?

11 MS. MAJESKI: 1990.

12 THE COURT: 1990. Okay. So I think you have a
13 claim against your pension. The pension has assets that are
14 set aside for you. And to the extent that they're
15 deficient, there's a, as you note, a federal statute ERISA
16 that provides some protection for people who are
17 beneficiaries of a pension that is deficient. But is this
18 pension a Sears pension or is it a pension -- is it a group
19 pension or a -- solely a Sears pension?

20 MS. MAJESKI: It's a Sears pension.

21 THE COURT: But it doesn't kick in until -- the
22 benefits don't kick in until you're retired generally even
23 if you're not --

24 MS. MAJESKI: So --

25 THE COURT: -- working for Sears anymore?

1 MS. MAJESKI: This is a very unusual benefit
2 because it was a supplement. In addition to my regular
3 pension because I was in a management position, this was --
4 I'm just going to say for the lack of a better term like an
5 added benefit.

6 THE COURT: Okay.

7 MS. MAJESKI: And it was a lump sum benefit that I
8 was entitled to.

9 THE COURT: I got you.

10 MS. MAJESKI: And that's what I am saying, hey,
11 wait a second, you know? That still is a retirement
12 benefit. I'm still entitled to it.

13 THE COURT: Okay. I understand. So it's not a
14 multi-employer pension plan. It's a Sears benefit.

15 MS. MAJESKI: Correct.

16 THE COURT: All right. Okay. So...

17 MS. MAJESKI: And since it's not a wage, I don't
18 how that could be taken out as not a priority claim because
19 it's not a wage that I'm earned --

20 THE COURT: No, that's right.

21 MS. MAJESKI: -- it's a --

22 THE COURT: But there's a separate category, the
23 wage indication, etc., that I read out before, which is
24 507(a)(4). The next junior priority after that is
25 507(a)(5), which is for allowed unsecured claims for

1 contributions to an employee benefit plan arising from
2 services rendered within 180 days before the date of the
3 filing of the bankruptcy case. So again, it's that limited
4 period where there's a priority. It's for contributions to
5 the plan for services rendered 180 days before the
6 bankruptcy petition date. So you would be outside of that
7 period because you weren't rendering services to Sears 180
8 days before the bankruptcy since you stopped working for
9 Sears in 1990.

10 It doesn't mean, again, that you don't have a
11 claim. It just means that you don't have a priority claim.
12 I was asking you the questions I was asking you because I
13 was hopeful that there might be assets in a pension plan
14 that you could look to, and I was going to tell Sears to
15 give you the information so that you could look to the
16 pension plan trustee to make a claim.

17 MS. MAJESKI: Could I still look at it? Because
18 maybe I'm incorrect.

19 THE COURT: Well, I don't -- it doesn't sound like
20 there is such a pension plan, but I will ask the Debtors to
21 check. And if there is such a plan that was actually set up
22 with the trustee and funded, and if not funded maybe ERISA
23 kicks in and the PBGC would owe you money. So I'll ask Mr.
24 Litz, the Debtor's lawyer, to --

25 Well, first, Mr. Litz, do you have information

1 about the specific benefit supplement that's the basis for
2 Ms. Majeski's claim?

3 MR. LITZ: Your Honor, I don't have that
4 information offhand. I'm happy to contact Ms. Majeski --

5 THE COURT: Right.

6 MR. LITZ: -- after this hearing in the next day
7 or so --

8 THE COURT: Right.

9 MR. LITZ: -- with supplemental information.

10 THE COURT: So I -- Ms. Majeski, Mr. Litz is going
11 to contact you and get more information about this
12 supplemental benefit and see -- for this purpose, to see
13 whether there -- it was set up as a -- like a pension plan
14 with a separate trustee and separate assets. And if that's
15 the case, then he'll put you in touch with the trustee.
16 There may not be one. It may not have been set up like a
17 pension plan with a trustee and separate assets and separate
18 funding. But to the extent it is, then I'm directing the
19 Debtor to provide you the information on who that trustee is
20 or -- you know, so that you can talk to them.

21 But as far as a claim against Sears is concerned,
22 while it may be a claim, and the Debtors are reserving their
23 rights on that, and you're reserving your rights on that, it
24 is not a priority claim. It doesn't fit within the specific
25 priority that Congress set up for contributions to an

1 employee benefit plan. Because again, it's a priority only
2 if it arises from services rendered within 180 days before
3 the bankruptcy filing date, and there were no services
4 rendered to the Debtor during that period.

5 And again, as I said at the beginning of this
6 hearing, priorities are to be construed carefully and
7 narrowly because there's a general policy that's only varied
8 by the specific statutory sections that give priorities in
9 favor of all unsecured Creditors being treated the same as
10 opposed to, you know, some leaping ahead of others. Except
11 where, again, Congress says they can, and you don't fit into
12 that section, which would be the only applicable one here.

13 So I will grant the supplemental objection. It
14 does appear to me that your second claim subsumes the full
15 amount of your claim. It just needs to be fixed. The
16 dollar amount needs to be fixed. And the fact that I would
17 disallow the earlier claim as duplicative doesn't prevent
18 you from fixing that dollar amount. At a minimum, it's the
19 amount that would've been in that claim. But if you figure
20 out there's more owed based on your actual retirement date,
21 then that would be the amount of your claim.

22 MS. MAJESKI: How would I go about adjusting that?

23 THE COURT: Well, if you want to spend the time to
24 do that, you would get that information from Mr. Litz.

25 MS. MAJESKI: I already have the letter stating

1 what it would be in 2023 --

2 THE COURT: Oh, okay.

3 MS. MAJESKI: -- and the exact amount.

4 THE COURT: All right.

5 MS. MAJESKI: Yeah.

6 THE COURT: So you have that. So --

7 MS. MAJESKI: And he has it as well.

8 THE COURT: All right. So that's fine.

9 MS. MAJESKI: The other thing --

10 THE COURT: But again, unfortunately, and this is
11 what I told Ms. Paek before you, at this point in the case,
12 the Debtors really are not focusing on fixing the amount,
13 the allowed amount, of general unsecured claims. Because
14 it's possible -- and I hate to say this, but it's possible
15 that holders of general unsecured claims will recover
16 nothing or very little. It all depends on the litigation
17 claims.

18 So they're spending their money, which actually
19 ultimately comes out of the Creditors because you know, it's
20 money being spent on fixing priority claims because those
21 are claims that look like they will be paid in full. And so
22 I don't think you should assume that the work to be done on
23 the exact amount of your claim will be done soon. They'll
24 do that --

25 MS. MAJESKI: And --

1 THE COURT: They'll do that when it looks like
2 there are meaningful assets to distribute.

3 MS. MAJESKI: I understand. Can I raise a
4 concern?

5 THE COURT: Sure.

6 MS. MAJESKI: So I had gotten a letter dated
7 October 4th from Sears, and in this letter, they said that
8 PBG and C had already decided that I wasn't entitled to
9 this, but that's not what you're asking Mr. Litz to do.

10 THE COURT: Well, maybe it is.

11 MS. MAJESKI: I'd like to know --

12 THE COURT: No, it may be. I want them to look
13 into the status and really the nature of this benefit. And
14 if it is set up as a pension covered by ERISA, then to put
15 you in touch with the trustee. If they've already done
16 that, then Mr. Litz will look into that, and conclude that,
17 you know, it really wasn't the pension and there is no
18 trustee and maybe that's what this letter is about.

19 Then, you know, he'll explain that to you, but I'm
20 not ruling anything as to your rights under ERISA or the
21 like. I just want to -- I want you to have more information
22 as to whether there is a -- you know, a trustee for this
23 plan and assets for it.

24 MS. MAJESKI: I would really like to know how that
25 supplemental benefit was set up. So thank you so much, Your

1 Honor.

2 THE COURT: All right.

3 MS. MAJESKI: I really do appreciate it.

4 THE COURT: Okay. Very well. So I --

5 MS. MAJESKI: Okay.

6 THE COURT: So the Debtor's lawyer will send me an
7 order that grants the claim objection as follows. It
8 disallows the first claim filed, 19381 as duplicative of the
9 remaining claim, 19385. And all of the Debtor's rights and
10 all of your rights in respect to that surviving claim are
11 fully reserved, except that it also reclassifies that claim
12 as a general unsecured claim, not a priority claim. Okay.

13 The next claim objection, and this is also an
14 objection to two claims, is to the claim of LeBaron, Beau
15 LeBaron, Beau LeBaron.

16 MR. LEBARON: Yep, I'm right here, Your Honor.

17 THE COURT: Good morning. And --

18 MR. LEBARON: Good morning.

19 THE COURT: -- it similarly addresses or seeks two
20 forms of -- actually, three forms of relief. First, it
21 seeks to disallow the earlier filed claim as duplicative of
22 the other claim.

23 MR. LEBARON: Right.

24 THE COURT: And second, seeks a determination
25 that, to the extent that the claim was filed after the bar

1 date for pre-petition claims, that the pre-petition claims
2 in the proof of claim be disallowed as untimely filed. And
3 then also objects to the priority of the claims to the
4 extent that they would not fit into either Section 507(a)(5)
5 or 507(a)(4) of the Bankruptcy Code. I think that -- and I
6 have Mr. LeBaron's responses, and I think one actually came
7 in recently.

8 MR. LEBARON: Yeah.

9 THE COURT: I want to --

10 MR. LEBARON: Sorry about that.

11 THE COURT: No, that's fine. I want to first
12 address the bar date issue. The -- as I read the claims --
13 this is more of a question for Mr. Litz than for you, Mr.
14 LeBaron. As I read the claim, only a portion of it is for
15 the pre-bankruptcy period, the period before the bankruptcy
16 petition date, which was October 15, 2018. The attachment
17 to the claim lists a lot of commissions with respect to
18 sales occurring from October 16th, which would've been a day
19 after the petition date, and then further into 2018.

20 So this is really, again, a question for the
21 Debtor's lawyer. I think the whole claim would be
22 disallowed for having been filed after the bar date for pre-
23 petition claims, right? It's just that portion that's pre-
24 petition that would be disallowed.

25 MR. LITZ: That's correct, Your Honor.

1 THE COURT: Okay. And then as far as the -- as
2 that is concerned, Mr. LeBaron, I really didn't see a basis
3 in your responsive papers to the objection.

4 MR. LEBARON: Can I give you some just -- one bit
5 of input?

6 THE COURT: Well, I want to go through --

7 MR. LEBARON: (Indiscernible)

8 THE COURT: Because I -- there are multiple
9 objections to the claim. I just want to focus on why the
10 claim was filed late, and it was filed late.

11 MR. LEBARON: Okay.

12 THE COURT: It was filed on April 13, 2020 when
13 the bar date was April 10, 2019. So it was over a year
14 after the bar date, and actually six months after the plan
15 was confirmed. So that's what I want to focus on first, why
16 was it filed late?

17 MR. LEBARON: Well, I was obviously a project
18 consultant from 2018 to -- is it too loud, you guys? I'm
19 sorry if it is.

20 THE COURT: No, I can hear you.

21 MR. LEBARON: I was a project consultant from 2018
22 in February until the bar date or the actual filing date
23 10/15/2018. And up to that point, there was a lot of, I
24 guess, vendors walking, having problems, and I was hit -- I
25 was actually sent to you by the Labor Board. If you know

1 the facts in my original plan paperwork, there is 17
2 violations of the Labor Law in California that apply here.

3 Basically, I didn't think I could come to this
4 case. I thought I was out of luck. And I went to the Labor
5 Board for transform and for an apportion of transform of me.
6 The Labor Board then, after looking at all the stuff I had,
7 said, well, wait, this part goes before the filing date for
8 Sears, so it could be possible. And then when we talked
9 more an looked into it, we found all the violations. They
10 felt -- they sent me to you with this number. I didn't come
11 to you with this number. I didn't come to you with this
12 number. They sent me here saying this is the number that
13 you should be asking for.

14 Now, there is \$8,000 in penalties included in that
15 total number that needs to probably be removed, and I can
16 (indiscernible) Mr. Litz about that. I just didn't know. I
17 have to say excusable neglect because I was working. All
18 the bar dates I was an employee selling, generating revenue
19 for the Debtor because I was still employed from them up
20 until 6/9/2019. I have paperwork that says I was let go,
21 terminated, on 6/12/2019.

22 Now, they say I was leased to a transform, but I
23 was an employee of Sears all the way through. So on the bar
24 date, the 22nd, I was actually out selling a project for
25 generating revenue, thus helping them. And in this

1 shortfall of that part after the filing date, all the
2 dollars that I'm trying to talk about are basically due to
3 the fact that the Debtor's license was suspended for some
4 part of that time. They couldn't operate.

5 I wasn't told this. I'm required to go to their
6 appointments and sell and bring money in, yet they are not
7 required to have a license in the state of California.
8 They're not required to follow the law, and they're not
9 required to pay me for those projects because six months
10 later they canceled them all because they transform -- they
11 go to transform, and I don't get paid. I just get let go,
12 terminated, and that's where I come back with this number.

13 Now, I have to say I'm not a lawyer and I've never
14 done this before. This is -- I guess the word -- term -- I
15 could say is excusable neglect because truthfully, I was the
16 (indiscernible) employee. I didn't know on the 22nd that I
17 was going to have this problem on June 19th.

18 THE COURT: Well --

19 MR. LEBARON: I was told I was going to be paid.

20 THE COURT: Well, I guess that's the question I
21 have, which is when the commissions accrued --

22 MR. LEBARON: Biweekly.

23 THE COURT: Well, let me -- I'm just -- I'm going
24 to focus in on the claim.

25 MR. LEBARON: Okay. There's a compensation

1 handbook from Sears, from the Debtor, called --

2 THE COURT: No, I know.

3 MR. LEBARON: -- the 1591.

4 THE COURT: I'm sorry. I just --

5 MR. LEBARON: Okay.

6 THE COURT: You can't see me, but --

7 MR. LEBARON: No problem.

8 THE COURT: -- I'm looking at the claim. They

9 start I think -- I think the earliest ones --

10 MR. LEBARON: April 13th.

11 THE COURT: April 13 of 2018.

12 MR. LEBARON: Correct.

13 THE COURT: And then they go through October 13,

14 2018. So --

15 MR. LEBARON: Right. And I do apologize to the

16 Court. I know I sent a lot of paperwork to all of your

17 people --

18 THE COURT: No, that's fine.

19 MR. LEBARON: -- and all your people that work

20 there.

21 THE COURT: That's why I'm just focusing on that

22 period. I -- having listened to you carefully, I think what

23 you're saying to me is that you didn't file a claim by the

24 bar date because you felt that you were going to be paid on

25 these amounts, on these commissions.

1 MR. LEBARON: Correct.

2 THE COURT: And but --

3 MR. LEBARON: Yeah.

4 THE COURT: But when would you normally be paid on
5 them? For example, one back from April or May, when would
6 you be normally paid on those commissions?

7 MR. LEBARON: Well, they -- when I first attempted
8 to, with my manager from the LA office here in California, I
9 was told that I couldn't -- I could not regain on that.
10 However, then I was told later on in May of 2019 by
11 management to fill out these claim forms, not these forms,
12 but separate forms from within the company, to regain that
13 money. Because they said you can get it back --

14 THE COURT: Okay.

15 MR. LEBARON: -- and that's when I said, okay,
16 I'll try, but then I was terminated.

17 THE COURT: But that was --

18 MR. LEBARON: And --

19 THE COURT: But I'm just focusing on the bar date
20 and then --

21 MR. LEBARON: Well, the bar date -- here's the
22 thing. Like with the bar date, and I understand what you're
23 trying to say. I really would want to find out is if my
24 thinking is wide and respond. There was only two weeks. At
25 that point, I was under the impression I could not get my

1 commissions reinstated that they took from me, which amount
2 to what's in their own policy deductions that are basically
3 beyond my control.

4 So my position is to sell interiors. I sold
5 kitchens. I sold \$1 million in kitchens. I lost about
6 \$282,000 in kitchen revenue, which ended at digging my
7 commission throughout the entire period. Now, that was
8 really -- the fallout happened after 10/15. On the bar
9 date, I wasn't experiencing the deductions in my paycheck
10 until early February. So February, the first couple of
11 weeks of February, I didn't get a check.

12 I talked to a supervisor. Then the 19th passes,
13 the 22nd passes, and that day -- as a matter of fact, I was
14 actually out sick. I got bit by a brown recluse and my hand
15 was like the size of a softball. But here nor there, I
16 didn't even know at that point I had a claim. I knew that
17 they had a claim that they sent me. I figured, okay, you
18 just leave it in and it's going to go through. It's going
19 to pass through, in other words, like a --

20 THE COURT: Can I -- when -- you frequently --
21 before the items that are on this proof of claim that are
22 listed as being unpaid, how frequently would you get paid by
23 Sears?

24 MR. LEBARON: That's actually included on those
25 two packets I first initially gave you on 4/13/2020.

1 There's a form -- there's a sheet in there that has all my
2 paydays. Every -- biweekly.

3 THE COURT: It's biweekly, right?

4 MR. LEBARON: Yeah, and California law, it's
5 required that way so if you --

6 THE COURT: All right --

7 MR. LEBARON: -- sell --

8 THE COURT: -- so --

9 MR. LEBARON: -- it's a two-week period.

10 THE COURT: So, it's biweekly and it's based on a
11 salary or based on commissions? It's the latter, right?

12 MR. LEBARON: It's based on a commission, but in
13 California, they call those wages and --

14 THE COURT: Okay.

15 MR. LEBARON: -- after the fact.

16 THE COURT: So, if you -- why would you not know
17 shortly after, you know, let's say the first one of these
18 missed payments is in April of 2018. Why would you not know
19 that it was missed?

20 MR. LEBARON: I can tell you why. The manager in
21 my office collected pay stubs. Right? You put them in an
22 envelope and then you put them in his desk, in a file
23 cabinet somewhere, so we just got everything electronically
24 transferred to your account. I never got a pay stub until I
25 started asking these questions about this, because it came

1 late in the year. I said, these guys are going to be -- if
2 I'm going to come to the new company, what happens to those
3 claims I filed with the company already.

4 They said, yeah, they're going to go through. You
5 have to go through them with a manager. That was just -- I
6 mean, you've got to realize my position was every day on the
7 field, three appointments a day from New York to San Diego
8 to Santa Barbara. I was on the road. So, there was like,
9 when the check arrived in your account, all you know is the
10 money got there. I would go back and argue. I argued for
11 months about this with my managers, and they hated me at the
12 end because I honestly -- every time I saw a deduction, I
13 was like, what's this for.

14 There was nothing on my pay stub with that and I
15 have now -- it took me two years to get the pay stubs. I
16 didn't get those until February 25th, 2021.

17 THE COURT: But wouldn't you know that you --

18 MR. LEBARON: They withheld my pay stubs for that
19 long.

20 THE COURT: How much -- are there things -- are
21 the items on the proof of claim that weren't being paid
22 before the petition date? Were there other amounts that
23 were paid during those pay period, during the petition --

24 MR. LEBARON: Well, yes. There's the basic --
25 what happens is that these people, they have a policy where

1 you start a job. It gets measured. It gets recapped and
2 then the installer goes in and starts. Once that happens, I
3 should be clear from deduction unless a gross mistake
4 happens, because there's two measures. That second measure
5 keeps me -- it goes to RTP status. It's in their
6 compensation book.

7 That's one of their policies and the point is, is
8 that I get dinged every time, for every job I sell and
9 because I sell a lot more jobs, there's always mistakes, but
10 the point is, these mistakes come at the very end when I
11 have nothing to do with the project, so when it's beyond my
12 control, in California law and in their own policy book, I
13 should not be getting dinged and that was my point all
14 along. They go --

15 THE COURT: I'm just --

16 MR. LEBARON: -- as far as deducting an entire
17 check.

18 THE COURT: -- focusing on whether there was
19 excusable neglect at this point and what --

20 MR. LEBARON: Okay.

21 THE COURT: What I'm still trying to understand
22 is, normally --

23 MR. LEBARON: So, you're wondering, why I didn't
24 file a claim --

25 THE COURT: Let me finish, because I'm going to

1 try to ask this question better than I asked it before.

2 Normally, someone that gets a biweekly payment pretty much
3 expects to get dollar X, right? And if they don't get
4 dollar X, a red flag goes up and they say why --

5 MR. LEBARON: Right.

6 THE COURT: Why am I not getting what I'm owed?
7 Why am I getting --

8 MR. LEBARON: Okay

9 THE COURT: -- you know, instead of X, why am I
10 getting X minus, you know, \$5,000.

11 MR. LEBARON: I have a very good answer for you.

12 THE COURT: Okay.

13 MR. LEBARON: I have a very straight answer for
14 you. Your Honor, I had -- I was one of the -- it may not
15 seem like it now, but I was one of the better reps for
16 interiors then. I was selling, like -- my first month out,
17 I sold \$142,000. Right? My first month. That was a lot
18 for that -- for my area. It was a pretty good number. The
19 next month, was \$116,000. Basically, what happened was I
20 was making money starting in July.

21 Those checks started rolling in for me. My mom
22 had breast cancer. I was basically taking care of her and
23 also working full time, selling and making my numbers. When
24 I had a chance to stop and slow down and look at it, it was
25 already mid-October, because I stopped to look at it because

1 suddenly October came and my numbers went like this, and I
2 was still telling. I couldn't figure out why checks were
3 disappearing.

4 Fourteen checks, I didn't get paid for throughout
5 that period, after the petition date, and that's when I
6 didn't think about it, because I was like, you know, I'm
7 going to try to stay on for Transform. I want to be part of
8 the new company, but I was also bugging management about my
9 pay, and they would say -- waving me off, saying, hey, just
10 to run your leads and come back, we'll talk about it.

11 So, I did. I did what management asked me to do.
12 I probably did the wrong thing by not saying anything, but I
13 wanted to keep my job because I felt if I made a noise, I
14 would be fired and I loved what I did.

15 THE COURT: And you say they told you that
16 sometime, when, after the bankruptcy case?

17 MR. LEBARON: Oh, my gosh, I think the first time
18 I got written up was December because I didn't make my
19 numbers and that was basically because of fallout in clients
20 and I just went in saying look, I got docked for \$1,000.
21 And they said, don't worry about it. You know, we're moving
22 to be moving to service. So, you have to realize that
23 during that period, service was happening or the bid was out
24 there, right?

25 That bid, we were told we were going somewhere

1 else and starting something new and that got really dropped
2 and the whole ship -- department got, I believe from that,
3 that whole transaction, I'm sorry to say, I think that's
4 what really messed up my situation. There was a walkout.

5 THE COURT: But when --

6 MR. LEBARON: The people above me were responsible
7 for my check were gone.

8 THE COURT: When -- I mean, look, the bar date
9 order is in February and the bar date is April 2019. What
10 were you -- what happened between February and April that
11 cause you not to file a claim?

12 MR. LEBARON: Excellent question. There was
13 somebody that was above me that was my project coordinator
14 who was responsible for making sure I would get paid, and my
15 projects moved. He quit. He quit in December. They hired
16 someone in January who didn't work out and who did nothing.
17 I didn't get a check in January, all of February, half of
18 March, and all of April. Not one check. I got expense
19 checks, mind you, for mileage, right, for going everywhere,
20 but I didn't get a single check while selling over \$299,000,
21 which I would've made around -- I mean, they paid me \$9,000
22 that year. I sold \$399,000 in projects.

23 THE COURT: But that's not a good fact for you on
24 the bar date, because that looks like you were pretty much
25 on notice that they weren't paying you.

1 MR. LEBARON: Well, that was the second week of my
2 first -- so February was my first two weeks of nonpayment,
3 so that first two weeks went by and sometimes, you get a
4 job, it goes in, and it doesn't measure fast enough, so
5 sometimes, it takes two to four weeks, so I realize there's
6 a wheel. There's always a wheel turning, and I know the
7 money's coming in, but the point is, is that you -- I went
8 to the town hall meeting. I saw the letter saying Peter --
9 Eddie Lampert says he doesn't assume there's going to be any
10 issue with pay.

11 I was experiencing it right then. That's when I
12 wrote to my manager and wrote letters and I got written up
13 for writing too many emails about it. Nobody said anything,
14 so I was going to management, who didn't instruct me what to
15 do, because I didn't know. I was just working my -- every
16 day. I had a job six days a week, 16 hours a day, and that
17 was Sears Home Improvement, and I was selling and generating
18 revenue for -- I hate to say it, but for the bankruptcy. I
19 mean, I was helping people in the bankruptcy, as far as I
20 knew.

21 THE COURT: All right. Okay.

22 MR. LEBARON: That's what they were telling us, at
23 least. I -- look, you're not under oath. This has not been
24 scheduled as an evidentiary hearing. I don't have Sears'
25 side of the story on this. I can tell you preliminarily,

1 it's going to be difficult for you to convince me that this
2 claim should be treated as timely for the pre-bankruptcy
3 portion of it. The Second Circuit -- and it's not alone in
4 this -- takes bar dates really seriously and in fact --

5 MR. LEBARON: Can I ask a question?

6 THE COURT: Well --

7 MR. LEBARON: Can I ask you a question?

8 THE COURT: You can as soon as I --

9 MR. LEBARON: Okay.

10 THE COURT: I want to explain this to you first.

11 MR. LEBARON: Okay.

12 THE COURT: In fact, they say, "They have taken a
13 hard line in applying the excusable neglect test." They say
14 in a typical case, three of the factors -- the length of the
15 delay, the danger of prejudice, the movant's good faith --
16 usually weigh in favor of the party seeking the extension.
17 But the circuit and other circuit -- the other circuits have
18 focused on the third factor the reason for the delay,
19 including whether it was within the reasonable control of
20 the movant.

21 And then they say, "We caution that the equities
22 will rarely, if ever, favor a party who fails to follow the
23 clear dictates of the court rule, and that when the rule is
24 entirely clear" -- that would be the bar date order -- "we
25 continue to expect that a party claiming excusable neglect

1 will, in the ordinary course, lose under the test."

2 Now here, the delay is really long. I mean, it's
3 a year and in addition to that, it's six months after the
4 plan was confirmed and at least from what you've told me,
5 although I understand that you were working hard and you
6 were getting some money so, you know, it wasn't -- as you
7 told me, it wasn't clear that this money --

8 MR. LEBARON: I wasn't getting --

9 THE COURT: -- wasn't being owed.

10 MR. LEBARON: I wasn't getting my wages. I was
11 expenses, which is a totally different item.

12 THE COURT: Well, okay. But that's not --

13 MR. LEBARON: That's just gas.

14 THE COURT: But that's not a good fact for you.
15 That indicates that something's wrong that would lead
16 someone to --

17 MR. LEBARON: Well --

18 THE COURT: -- file a proof of claim. I'm not
19 ruling on this today --

20 MR. LEBARON: Okay -- at that point --

21 THE COURT: I'm just giving -- I'm just giving you
22 the heads up.

23 MR. LEBARON: Sorry, go ahead.

24 THE COURT: -- that it's an uphill fight and --

25 MR. LEBARON: I understand that, but I just want

1 to point out that it is illegal for a company to not pay me
2 my wages after a bankruptcy filing.

3 THE COURT: That's a separate --

4 MR. LEBARON: Is that not true?

5 THE COURT: I'm not talking about the wages your
6 earned post-bankruptcy. And I'm not --

7 MR. LEBARON: Okay.

8 THE COURT: -- talking about not paying wages,
9 either. You still have a claim for it.

10 MR. LEBARON: Okay.

11 THE COURT: The issue is whether --

12 MR. LEBARON: Right.

13 THE COURT: -- that claim was barred by the
14 failure to file it in a timely fashion. It's two different
15 things.

16 MR. LEBARON: So -- I get that, and I would say
17 this. My one response to that is -- so you know how I --
18 where I stand is that if I was working six days a week
19 required to run appointments and they literally write you up
20 if you don't do it and they make you also work night a week
21 and you're in office two days a week, and I have Sunday.
22 Right? And I also have a mom in the hospital in Carlsbad
23 about 120 miles away with cancer who's getting through
24 surgery.

25 That period of time was when that happened, so

1 from August 25th 2018 until November to December at least, I
2 was in -- worked every day, six days a week, because I had -
3 - they were piling (indiscernible) on, because they said, if
4 you don't perform, you're not going to make it to service.
5 And, you know, I can't prove exactly what the manager said.
6 I mean, I do have some proof of what they were telling us to
7 say, obviously.

8 THE COURT: Okay.

9 MR. LEBARON: But --

10 THE COURT: And that's what -- I will need --

11 MR. LEBARON: The fact of the matter is, is that -
12 -

13 THE COURT: I will need --

14 MR. LEBARON: I believe --

15 THE COURT: -- evidence on that point. But again,
16 if you were only getting paid expenses for that pre-
17 bankruptcy period --

18 MR. LEBARON: I took a loan.

19 THE COURT: I appreciate you want to keep your
20 job, but unless they're making you threats such as, you
21 know, don't file a claim or we're going to fire you, which
22 they're not allowed to do --

23 MR. LEBARON: Well, I'll just say this. They told
24 us on 4/19 that when the claim came up in a meeting, they
25 said, don't do anything. Just let it sit, because --

1 THE COURT: Yeah, but that's after --

2 MR. LEBARON: -- you know --

3 THE COURT: That's after the bar date. So --

4 MR. LEBARON: Right, but it's also before ---

5 December 15th, there was a letter stating that we were going
6 to service, so if we were going to service --

7 THE COURT: Again --

8 MR. LEBARON: -- I thought there'd be no problem.

9 THE COURT: That's -- well, but again, that's
10 after the bar date, too. So --

11 MR. LEBARON: Well, service was January, right?
12 January 2019?

13 THE COURT: I'm sorry.

14 MR. LEBARON: (indiscernible).

15 THE COURT: Yes. I think that's right.

16 MR. LEBARON: So, we didn't find out that we were
17 actually Transform until February 19th, 2019. That's when I
18 found out officially that we were going to become Transform.

19 THE COURT: Okay.

20 MR. LEBARON: And service was out the door, right.

21 THE COURT: So, let me focus, then, on the post-
22 petition period.

23 MR. LEBARON: Sure.

24 THE COURT: What, if anything -- this is now a
25 question for the Debtors -- what, if anything, are you

1 objecting to with respect to the post-petition claim, if
2 anything? Maybe you're not.

3 MR. LITZ: Your Honor --

4 MR. LEBARON: (indiscernible).

5 THE COURT: No, I'm asking the Debtor. The
6 Debtors' lawyer, this.

7 MR. LITZ: Your Honor, as you noted, this is a
8 sufficiency hearing, and we are reserving our rights with
9 respect to post-petition claims --

10 THE COURT: Right.

11 MR. LITZ: -- asserted by Mr. LeBaron.

12 THE COURT: Okay. So, Mr. LeBaron, that portion
13 of your claim, which is the largest portion, is not going to
14 be addressed by anything from today.

15 MR. LEBARON: Okay.

16 THE COURT: I'll also note that even if I deemed
17 your claim to be timely filed, if I eventually found
18 excusable neglect, which I've already told you is going to
19 be an uphill fight, you would only have a priority for the
20 statutory cap that was in effect at that time, which is
21 \$12,850. That's --

22 MR. LEBARON: Okay, can I ask you one --

23 THE COURT: -- nothing, obviously. That's better
24 than nothing, but that's a lot less than the --

25 MR. LEBARON: I understand that, and I knew that

1 that was potential here. I realized that going into it, but
2 I have a question is, what would -- is there something I'm
3 able to still fight on the other part? Because I feel like
4 they didn't pay me --

5 THE COURT: Yeah, if they -- if you were to --

6 MR. LEBARON: A lot of bad things happened after
7 the (indiscernible) date.

8 THE COURT: I mean, again, this is not really
9 before me today, but if you were taken on by Transform, then
10 you would have a claim against Transform and I'm not --

11 MR. LEBARON: I have a case against Transform as
12 well.

13 THE COURT: -- sure even -- and it's murky, to be
14 -- I don't know whether the Debtors have any responsibility
15 post the Transform transaction. I don't know how that was
16 documented with you and that's not rightly before me, so I'm
17 not going to address that today.

18 MR. LEBARON: Okay, that's no problem. I'm not
19 going to bring it up. I just know that I have good
20 sufficient evidence that shows that --

21 THE COURT: All right.

22 MR. LEBARON: -- transition.

23 THE COURT: Well, that's something that you can
24 talk about with the Debtors because again, their focus is
25 not on the general unsecured claims right now. It's on the

1 priority claims --

2 MR. LEBARON: Okay.

3 THE COURT: -- and on the post-petition --

4 MR. LEBARON: Yeah.

5 THE COURT: -- administrative expenses. That's
6 what their focus --

7 MR. LEBARON: I just felt that unsecured --

8 THE COURT: So, this is not --

9 MR. LEBARON: -- or wages unpaid --

10 THE COURT: So unlike the last two claim
11 objections that I heard where I was very upfront with the
12 claimants that while their unsecured claim survives subject
13 to the Debtor's right to object to it on the merits, that
14 probably won't get addressed for quite a while. But your
15 post-petition claim will be addressed right away, soon.

16 MR. LEBARON: Okay.

17 THE COURT: So you should be talking with the
18 Debtors about it, about why you think the Debtors are liable
19 instead of Transform. And it may be that as part of that,
20 they can resolve the \$12,850 issue as to whether you would
21 have a priority claim for that or not based on the bar date
22 issue.

23 MR. LEBARON: Okay.

24 THE COURT: So what I'll do today, and all that I
25 will do today, is grant the supplemental objection to the

1 extent that it reclassifies your prepetition claim as a
2 general unsecured claim except for the statutory cap for
3 wages, commissions, et cetera, which is the \$12,850.

4 MR. LEBARON: Okay.

5 THE COURT: But the order will also say that all
6 rights as to the merits of that priority claim and the other
7 claim, the unsecured claim, and the post-petition claim are
8 fully reserved.

9 MR. LEBARON: I understand.

10 THE COURT: And that includes your right to assert
11 that there is excusable neglect on the pre-petition -- you
12 know, the prepetition portion, both the \$12,850 and the rest
13 that's pre-petition, and the Debtor's rights obviously to
14 say that it's untimely.

15 MR. LEBARON: Okay.

16 THE COURT: And my guess is, my expectation is you
17 guys may well resolve that issue, the \$12,850, along with
18 the administrative claim together before I have another
19 hearing, but we'll see.

20 MR. LEBARON: Okay. And I have one last question.
21 On there, I believe (indiscernible) discussed this, there is
22 a \$10,000 or \$20,000 (indiscernible) for my policy, it was a
23 life insurance policy. I thought that was owned. Is that
24 not the case? I'm not sure.

25 THE COURT: I'm sorry, I don't understand.

1 MR. LEBARON: There was a \$45,000 life insurance
2 policy that came with my position. And I thought after the
3 first year, you owned it. And I'm puzzled, because when
4 they went out of business, that just vanished and I've never
5 seen anything of it again. So they filed for ten of that.

6 THE COURT: That's a separate -- that's also
7 nothing I am dealing with in this order.

8 MR. LEBARON: Okay. Okay.

9 THE COURT: Okay.

10 MR. LEBARON: Thank you, Your Honor.

11 THE COURT: Okay, all right. So I will look for
12 that order, Mr. Litz. And you should just copy Mr. LeBaron
13 on it when you send it to chambers so he can make sure it's
14 consistent with my ruling.

15 MR. LITZ: Thank you, Your Honor.

16 THE COURT: Okay. So the next one on my list is
17 the claim of Marshall Lindquist. Is Mr. Lindquist on Zoom
18 or on the phone? Okay. He is not apparently. This is
19 another modified claim objection. It was originally a books
20 and records objection. And in the supplement, the Debtors
21 simply sought to reclassify the claim, preserving their
22 other rights. Right, Mr. Litz? Am I correct on that?

23 MR. LITZ: That's correct, Your Honor.

24 THE COURT: Okay. And I will grant that objection
25 and reclassify the claim. The claim wouldn't fit in the

1 180-day window under either 507(a)(4) or 507(a)(5). The
2 claim, it is clear, is for services rendered before the date
3 that Mr. Lindquist was terminated, which was in June of
4 2017. So he would not be entitled to a priority claim. And
5 as the Debtors cite, the fixing of that claim, which could
6 have fallen within the 180-day period, is irrelevant to the
7 priority. What is relevant is when the facts giving rise to
8 the claim occurred, i.e. the services rendered. And that
9 was well before the 180-day period set forth in 507(a)(4) or
10 507(a)(5). The fixing of the claim just liquidated it but
11 did not create it, in other words. It was an unliquidated,
12 matured claim before that. See In re Avaya Inc., 2019 WL
13 1858847 *6-7 (Bankr. S.D.N.Y. April 22, 2019). So you can
14 email that order to chambers.

15 And then we have the claim of Puja Thakkar. I
16 hope I'm pronouncing that right, T-h-a-k-k-a-r. Is Ms.
17 Thakkar on the phone? Okay. This is another
18 reclassification objection. The rest of the original
19 objection is reserved. And it's clear to me based on Ms.
20 Thakkar's claim that, again, her claim for wages and/or
21 benefits in addition to being well above the statutory cap,
22 was for services rendered before the 180 days would have
23 run. Or would have started, excuse me, for purposes of
24 507(a)(4) and (a)(5) of the Bankruptcy Code.

25 It appears that she worked through 2015. There's

1 some suggestion that she was being harassed by Sears
2 employees in February of 2018, which again, is outside of
3 the 180-day window and in all likelihood wouldn't be a
4 priority claim because it wouldn't be for wages or the like.
5 It was clearly pre-petition.

6 So you can submit the same type of order that I've
7 already asked you to submit on the other ones, reclassifying
8 the claim and reserving all other objections and Ms.
9 Thakkar's right to respond.

10 MR. LITZ: Thank you, Your Honor. We'll submit
11 the order.

12 THE COURT: Okay. And then we have Mr. Bass'
13 response to the 31st Omnibus Objection, which objected not
14 on the basis that the claim should be reclassified from
15 priority to general unsecured, but rather that it should be
16 reclassified as not being a secured claim. Is Mr. Bass on
17 the phone or on Zoom? Okay.

18 I have reviewed the proof of claim which attaches
19 a settlement agreement for \$5,150 dated March 10, 1998.
20 It's not clear to me why such a claim is being pursued at
21 this point in any event. But there is no evidence of any
22 security interest being granted and no recordation of any
23 judgment and no perfection of any lien shown on the proof of
24 claim. And based on the objection that was filed, if not
25 even before then, Mr. Bass had the responsibility to

1 establish a valid and perfected and enforceable lien by
2 showing the appropriate documentation since the Debtors had
3 shifted any presumption of the validity of the claim back
4 onto the claimant. So he has not carried his burden of
5 proof on the reclassification point. See In re Arcapita
6 Bank B.S.C.(c), 508 B.R. 814, 814 (S.D.N.Y. 2014) and In re
7 Oneida Limited, 400 B.R. 384, 389 (Bankr. S.D.N.Y. 2009),
8 affirmed 2010 WL 234827 *5 (S.D.N.Y. January 22, 2010).

9 So you can submit an order reclassifying the claim
10 from secured to general unsecured and reserving all other
11 defenses and claims.

12 The next claim objection on the agenda is the
13 Debtor's objection to -- I believe it's Mr. Mirjalili's
14 proof of claim. That's M-i-r-j-a-l-i-l-i, Proof of Claim
15 1818. Again, this is an objection on the basis that the
16 claim has been listed as secured on the proof of claim. And
17 again, the Debtors have asserted that there is no evidence
18 of any lien or the perfection of any lien in respect of that
19 claim.

20 Is Mr. Mirjalili on the phone or on Zoom? No.

21 Okay.

22 I've reviewed the claim objection. And, again,
23 there is no evidence of any lien documentation. The one
24 issue I have is he underlined in the priority section a
25 deposit towards services. There is no evidence of any

1 deposit in the attachments that he's attached to the claim,
2 which include the purchase agreement and an addendum to it
3 for heating and cooling services. And I was unable to see
4 any sort of deposit provided for there, which, in addition
5 to maybe creating a lien depending on how it was documented,
6 might create a priority under Section 507(a)(7). There is
7 clearly no priority for taxes or for simply the purchase of
8 the services.

9 And in light of that and Mr. Mirjalili's failure
10 to attend today's hearing and answer that question I had
11 about a deposit, I conclude that the Debtors shifted the
12 burden of proof to the extent that there was a presumptive
13 validity of the claim as to the priority and the secured
14 claim back onto the claimant. And Mr. Mirjalili has not
15 carried his burden of proof to show that the claim is either
16 secured or entitled to priority treatment. So you can email
17 that order to chambers.

18 Let me just add there is a warning label or a
19 required disclosure under the law of the State of Washington
20 on the agreement between Sears and Mr. Mirjalili that refers
21 to the purchaser's right to a pro-rata share of either a
22 \$12,000 bond or deposit required to be made by the service
23 provider under Washington law. There is no evidence that
24 that is what Mr. Mirjalili is looking to here. But I will
25 ask you to put into the order that to the extent that Mr.

1 Jalili asserts a right to a specific pro rata share of any
2 bond or deposit posted under Washington law applicable to
3 the agreement, those rights are preserved.

4 MR. LITZ: Thank you, Your Honor. We will do so.

5 THE COURT: Okay. All right. And then the last
6 one on my list at least is the Debtor's 36th Omnibus
7 Objection as supplemented, again, to the claim of Kingdom
8 Seekers Inc./Aron Goldberger. There are actually two claims
9 here, Claim 26515 in the amount of \$5,531,000, and Claim
10 26517 in the amount of \$2,500,000. The objection, again,
11 seeks to reclassify these claims as general unsecured
12 claims. They've been filed as secured and priority claims.
13 And I have the Kingdom Seekers Inc. response to the
14 objection. Is anyone on the phone or on Zoom on behalf of
15 Kingdom Seekers, Inc. or Aron Goldberger? No.

16 All right. I have reviewed the objection as well
17 as the claims themselves, and it's clear to me that the
18 objection should be granted and the claim should be
19 reclassified with the preservation of all rights on the
20 merits with respect to the unsecure claim, i.e. post-
21 reclassification. There is no evidence of any lien
22 whatsoever, no security interest, no evidence of any
23 judgement that may have been recorded, and no evidence of
24 any other form of perfection.

25 As far as the administrative expenses that are

1 claimed, it appears to me that the Claimant has misread the
2 applicable provisions that it cites and asserts a claim
3 under 507(a)(2) and 507(a)(1), not on the basis of the
4 Debtor's obligations that would give rise to such a priority
5 claim, but rather the claimant's obligations to its own
6 creditor or Mr. Goldberger's creditor.

7 In addition, in looking at the attachments to the
8 proof of claim, it appears that to the extent it's based on
9 any work done or commissions earned, they are years before
10 the bankruptcy petition date and well outside of the 180
11 days before the petition date as well. The dates on the
12 attachments are in 2011. So I will grant the claim
13 objection insofar as it seeks to reclassify the two claims
14 as general unsecured claims. So you can submit that order
15 as well.

16 I'd like to make a suggestion on the orders.
17 Sometimes you do an omnibus order. I think probably it's
18 better here to do individual orders. What I suggest you do
19 is send me one. And if I have any changes to it, you can
20 note those changes and then mark up the others to track that
21 order. Okay.

22 MR. LITZ: Thank you, Your Honor. We'll do that.

23 THE COURT: Okay, very well. I think that
24 concludes today's agenda. I think all the other matters
25 were adjourned.

1 MR. LITZ: That's correct.

2 THE COURT: Okay. In the future when you submit
3 the binder where there is a response to a claim objection
4 and the Debtors have replied, you should include in the
5 binder the proofs of claim that were filed.

6 MR. LITZ: We'll make sure to do that.

7 THE COURT: So we don't have to track them down.
8 Okay. I see someone on the screen.

9 MS. NELSON: Yes. I was supposed to be here
10 today. I don't know if I just came in at the wrong time.
11 For Nelecia Nelson.

12 THE COURT: Okay. Are you here on the Sears case?

13 MS. NELSON: Yes, I am.

14 THE COURT: Okay. I think --

15 MR. LITZ: Your Honor, I think I can address this
16 one very briefly.

17 THE COURT: Okay.

18 MR. LITZ: Ms. Nelson had filed a response to one
19 of our omnibus objections and was inadvertently put on a CNO
20 that was filed with the Court. So we are revising to remove
21 her and work with Ms. Nelson to reconcile her claim.

22 THE COURT: Okay. So on the omnibus objection
23 that they submitted that covers your claim, Ms. Nelson, I
24 will enter an order only on the objections that were not
25 opposed. Since you opposed their objection, and that's been

1 confirmed now on the record, the hearing on your claim will
2 be adjourned to a later date. The Debtors in the meantime
3 will try to work with you to see if they can understand the
4 arguments you've made, and they may agree, they may
5 disagree. But it's not going forward today and your claim,
6 it still survives to be dealt with on a later date. And
7 you'll get notice of that date. Okay, very well.

8 MS. NELSON: Okay, thank you.

9 THE COURT: Okay. All right. Thanks a lot.

10 (Whereupon these proceedings were concluded at
11 11:27 AM)

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RULINGS

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Motion to Reclassify Claim from

Priority to General Unsecured

Granted

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Motion to Reclassify Claim from

Priority to General Unsecured

Granted

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Supplemental Objection Granted

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Claim Objection Granted with

Stipulations

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Supplemental Objection Granted

with Stipulations

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Motion to Reclassify Claim Granted

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Motion to Reclassify Claim Granted

with Stipulations

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

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Date: November 12, 2021